Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Commercial Spectrum	)	
Enhancement Act and Modernization of the	)	WT Docket No. 05-211
Commission's Competitive Bidding Rules and	)	
Procedures	)	
	)	

To: The Commission

COMMENTS OF COOK INLET REGION, INC.

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SUMMARY

The Commission's designated entity rules have been carefully crafted over the years to balance the need to promote participation by small business in competitive, spectrum-based services with the recognition that the wireless telecommunications industry requires significant capital expenditures and technical expertise. While the Commission has tentatively concluded that reforms to the designated entity program are warranted, it reaches that conclusion without a sufficient explanation of the abuses or problems these reforms are designed to address.

Cook Inlet Region, Inc. ("Cook Inlet") opposes the reform proposed by Council Tree Communications, Inc. and endorsed by the Commission in this *Further Notice of Proposed Rulemaking* that would restrict otherwise qualified designated entities from partnering with a large wireless carrier in future auctions. This proposed rule arbitrarily discriminates not only against a class of wireless carrier that has supported designated entity participants in past auctions but against those small businesses who have developed a relationship with this class of carrier. It unnecessarily undercuts the robust regulatory regime currently used by the Commission to fully and fairly evaluate designated entity applicants. It would further restrict the availability of capital and other resources critical to the survival and success of small businesses in the competitive, capital-intensive wireless industry. And it seems to be an indirect attempt by the Commission to curb consolidation in the industry by restricting participation in the designated entity program when the success or failure of the designated entity program is independent of and unrelated to the economic forces that lead to such consolidation.

Not only is the proposed rule change a mistake from a policy perspective, but the rule change could have significant, though potentially unintentional, consequences. It could unfairly prevent small businesses who have significant current or past relationships with these

large carriers from participating in future auctions as a result of these current and past relationships. In addition, the proposed rule could reduce designated entity participation in the upcoming Auction No. 66 – designated entities who have the option to commit to amend their applications after filing them in order to comply with subsequently adopted rules may simply chose not to participate in the auction at all.

Cook Inlet does support the strict enforcement of the Commission's existing rules regarding the qualification of designated entities pursuant to the "controlling interest" standard. Furthermore, Cook Inlet would support a carefully considered revision to that standard to increase the efficacy of the standard in ensuring that only qualified designated entities receive the benefits of the program. To this end, Cook Inlet suggests that the Commission require each designated entity to contribute some minimum, material level of capital to any venture that participates in the Commission's auctions and receives bidding credits or other small business benefits.

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COMMENTS OF COOK INLET REGION, INC.

Cook Inlet Region, Inc. ("Cook Inlet")[1] opposes the changes to the Commission's designated entity rules proposed by Council Tree Communications, Inc. ("Council Tree") and endorsed by the Commission in this *Further Notice of Proposed Rulemaking*.[2] The tentative conclusions reached by the Commission in the *Further Notice* are predicated on the perspective of one party, without the benefit of alternative points of view or, at a minimum, an evidentiary record demonstrating any need to reform the designated entity program. Although the Commission's existing designated entity rules may not be perfect, they have been carefully crafted over the years to balance the need to promote participation by small business in

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[1] Cook Inlet is an Alaska Native Regional Corporation organized pursuant to the Alaska Native Claims Settlement Act, 43 U.S.C. § 1601 *et seq*. Cook Inlet is owned by more than seven thousand Alaska Native shareholders of Eskimo, Indian, and Aleut descent. In addition to its for-profit business ventures, the proceeds of which are distributed to these individual shareholders in dividends, Cook Inlet has established a number of not-for-profit organizations that provide social services to the residents of Alaska, including education, career training, health, elder care and housing services.

[2] *Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures, Further Notice of Proposed Rulemaking*, WT Docket No. 05-211, FCC 06-8 (released Feb. 3, 2006) ("*Further Notice*").

competitive, spectrum-based services with the recognition that the wireless telecommunications industry requires significant capital expenditures and technical expertise. The program has enabled designated entities like Cook Inlet to launch commercial wireless service for the American public.

To the extent the Commission determines that reforming the designated entity program serves the public interest, the Commission should focus its attention on refining the "controlling interest" standard, rather than an arbitrary restriction on participation by a certain class of wireless carrier. This decision should be made based on actual evidence of abuse. By taking a reasoned, analytical approach to the problem, if any, with the designated entity program, the Commission can ensure that an appropriate solution to address an actual problem can be developed and implemented. By rushing to judgment, the Commission risks jeopardizing altogether future participation by small businesses in spectrum-based services. This is not the result Congress intended when it implemented spectrum auction authority more than a decade ago.

I. COOK INLET SUPPORTS A ROBUST DESIGNATED ENTITY PROGRAM THAT TRULY PROMOTES PARTICIPATION BY SMALL BUSINESSES.

Cook Inlet has a longstanding history as a recognized small business under numerous Commission programs. In the last decade, Cook Inlet has participated in multiple spectrum auctions as a qualified designated entity.[3] It has also acquired designated entity licenses on the secondary market, most notably from Pocket Communications out of

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[3] *See, e.g., Broadband PCS Spectrum Auction Closes, Winning Bidders Announced for Auction No. 58*, Report No. AUC-05-58-H, DA 05-459 (Feb. 18, 2005); *C and F Block Broadband PCS Auction Closes, Winning Bidders Announced*, Report No. AUC-35-H, DA 01-211 (Jan. 29, 2001); *C, D, E and F Block Broadband PCS License Auction Closes*, Report No. AUC-22-K, DA 99-757 (Apr. 20, 1999); *D, E, and F Block Auction Closes*, Report No. AUC-97-11-1, DA 97-81 (Jan. 15, 1997); *Entrepreneurs' C Block Auction Closes*, DA 96-716 (May 8, 1996).

bankruptcy.[4] Cook Inlet was the first designated entity in the United States to launch commercial wireless service – in June, 1997, it began operating a personal communications services system in Tulsa, Oklahoma. Cook Inlet has invested in eight companies in partnership with T-Mobile USA, Inc. (formerly VoiceStream Wireless Corporation) ("T-Mobile"), including most recently Cook Inlet/VS GSM VII PCS, LLC, which bid for and won 36 personal communications services licenses in Auction No. 58.

The Commission's designated entity program has satisfied congressional mandates and served the public interest by promoting participation by small businesses in competitive, spectrum-based services such as personal communications services. Participation by small businesses in these services simply would not have occurred without this program. Commercial mobile services are, as the Commission has repeatedly recognized, highly capital intensive.[5] Small companies face significant barriers to entry.[6] Experts have recognized that certain services like wireless telecommunications may be inherently national in scope,[7] making it potentially difficult for a small company to break in and survive as a local or even regional service provider.[8] And, as the Commission has recognized, it is particularly challenging for

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[4] *See Application for Assignment of Authorization from DCR PCS, Inc., Debtor-in-Possession to CIVS IV License Sub I, LLC*, File No. 0000249749 (granted May 1, 2001).

[5] *See, e.g., Section 257 Proceeding to Identify and Eliminate Market Barriers to Entry for Small Businesses, Report*, 12 FCC Rcd 16,802, 16,829 (1997) ("*Section 257 Report*").

[6] *See generally id.*

[7] *See Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Markets Conditions With Respect to Commercial Mobile Services, Ninth Report*, 19 FCC Rcd 20,597, 20,622-23 (2004).

[8] *See id.* at 20,641 (describing barriers to entry in commercial mobile services and noting that "[t]elecommunications has historically been an industry characterized by large investments in network infrastructure and vast scale economies, suggesting the scale economy and capital requirement barriers [to entry] are both high").

small companies to obtain access to the financial resources necessary to support bidding and paying for even one license in any given auction, much less to construct and operate a system within the time frame mandated by the Commission's rules.[9] Despite these obstacles, designated entities have participated successfully in the auction process: for example, 89 small business bidders won 493 licenses in Auction No. 5,[10] 93 small business bidders won 598 licenses in Auction No. 11,[11] and 48 small business bidders won 277 licenses in Auction No. 22.[12]

Cook Inlet supports active enforcement of Commission rules to maintain the integrity of the designated entity program for past and future auctions. In light of the success of the designated entity program in accomplishing its policy objectives, Cook Inlet is troubled by the Commission's recent focus on alleged shortcomings of the program and the slapdash approach to reform reflected in the *Further Notice*. The Council Tree proposal to reform the designated entity rules,[13] as reflected in the *Further Notice*, has not been designed to address a particular failure in the Commission's rules or practices with respect to the designated entity

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[9] *See, e.g., Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Fifth Report and Order*, 9 FCC Rcd 5532, ¶¶ 10-11 (1994).

[10] *See* Summary of Auction 5 at http://wireless.fcc.gov/auctions/default.htm?job=auction_summary&id=5 (viewed on Feb. 20, 2006).

[11] *See* Summary of Auction 11 at http://wireless.fcc.gov/auctions/default.htm?job=auction_summary&id=11 (viewed on Feb. 20, 2006).

[12] *See* Summary of Auction 22 at http://wireless.fcc.gov/auctions/default.htm?job=auction_summary&id=22 (viewed on Feb. 20, 2006).

[13] Letter from Mssrs. Steve C. Hillard and George T. Laub, Council Tree Communications, Inc. to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket Nos. 02-353, 04-356, RM-10956 (June 13, 2005) ("Council Tree Initial *Ex Parte*"); *see also* Letter from George T. Laub, Council Tree Communications, Inc. to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket Nos. 02-353, 04-356, RM-10956 (Jan. 13, 2006) ("Council Tree Additional *Ex Parte*").

program. Rather, it is an effort to discriminate against future participation by designated entities in partnership with a certain class of established carrier – despite the fact that these carriers are most likely to have the expertise and financial resources necessary to support a small business's efforts to enter the wireless services industry.

The Commission should take an opportunity to gather specific evidence about the nature and extent of abuses to its designated entity program. Indeed, to the extent the Commission determines that any violation or abuse of its rules has occurred, it should act swiftly to penalize such violations and curb such abuses. Once it identifies the problem with sufficient specificity, the Commission should hear proposed solutions from a variety of sources in both the public and private sector. It should evaluate these solutions and implement a rational reform. Cook Inlet urges the Commission to take a proactive but reasoned approach to designated entity reform rather than simply following the suggestions presented by Council Tree in its *ex parte* filings. Without first identifying the scope and nature of the problem, the Commission has no hope of implementing reform that will affect that problem. The Commission's focus on large wireless carriers would undermine the congressional mandate and policy objectives of the designated entity program while failing to accomplish any meaningful change in the program.

II. THE NEED FOR DESIGNATED ENTITY REFORM HAS NOT BEEN ESTABLISHED IN THE RECORD.

Cook Inlet is concerned by the absence of a factual record that justifies a rule change of the magnitude proposed in the *Further Notice*. The *Further Notice* tentatively concludes that changes to the designated entity program are warranted.[14] It implies that these changes are necessary to "ensure that only legitimate small business reap the benefits of the

[14] *See Further Notice* at ¶ 6.

Commission's designated entity program."[15] There is no discussion in the record, however, of any facts or circumstances that justify this conclusion – no citations to particular instances of abuse, no concrete examples of rule violations, no discussion of any Commission inquiry into the activities of any designated entity. Instead, the need for reform appears to be based entirely on Council Tree's *ex parte* presentations which are comprised of hyperbole and speculation rather than factual evidence.[16] The totality of the evidence in Council Tree's filings supporting the need for reform consists of (1) a press report in the *Wall Street Journal* regarding a pending case in federal court alleging that certain designated entities backed by Mario Gabelli were "shams" and violated the Commission's designated entity rules;[17] (2) the observation that wireless businesses are undergoing a period of consolidation;[18] and (3) a veritable "parade of horrors" describing the "specter" of "press accounts and congressional investigations" and the "'perfect storm' snowballing effect" of a "uniquely toxic situation" for future auctions, all of which will allegedly occur if the Commission fails to reform the designated entity program as Council Tree suggests.[19] But absent concrete evidence of a real problem, it is impossible to identify and implement an effective regulatory solution.

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[15] *Id.* at ¶ 7.

[16] *See, e.g.*, Council Tree Additional *Ex Parte* at 4 ("Specter of a half dozen wealthy DEs . . . ," a "NextWave-like outcome with disastrous consequences for all involved" that will "fuel press accounts and congressional investigations . . . ." "A 'perfect storm' snowballing effect . . . ."); Council Tree Initial *Ex Parte* at 6 ("[L]arge national carriers will deploy their enormous financial resources to dominate the AWS spectrum auctions. Small business and new entrant success will continue to wither . . . .").

[17] Council Tree Additional *Ex Parte* at 3, 15-17 (*citing* Wilke, John R., "Friends and Family: In FCC Auctions of Airwaves, Gabelli Was Behind the Scenes," *Wall Street Journal*, A1 (Dec. 27, 2005)).

[18] Council Tree Initial *Ex Parte* at 6; Council Tree Additional *Ex Parte* at 10.

[19] Council Tree Additional *Ex Parte* at 4.

Although the Commission is understandably and appropriately concerned about any abuse of its rules or programs – as it should be – it is absurd to suggest that Council Tree has set out an appropriate solution to a problem when there is no specific identification of the problem or any evidence that a problem even exists. The licenses at issue in the pending litigation were granted only after the Commission staff reviewed and evaluated the applications filed by these applicants. The fact that the wireless industry is undergoing a period of consolidation is unrelated to the designated entity program and the policies and objectives it was designed to promote. Council Tree's hyperbolic description of the landscape absent Commission reform of the designated entity program is not based on the identification and description of any instance of actual abuse. It is one thing to be concerned about potential abuses, and quite another simply to assume that abuse exists without the development of a factual record to support these claims. The Commission explicitly requests comment "on the factual assertion upon which Council Tree's proposals are based."[20] Cook Inlet's response – the only rational response based on this record – is that there is no foundation in the record justifying these reforms.[21]

The Commission has apparently concluded in its *Further Notice* that eliminating the participation of five large wireless carriers in support of designated entities will eliminate problems with the program. It has reached this conclusion without any evidence suggesting that these carriers as the source of any actual or perceived violations of the current rules. The mere

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[20] *Further Notice* at ¶ 11.

[21] In fact, Cook Inlet made this same observation in response to the Council Tree Initial *Ex Parte*. *See* Letter from Mr. Kurt A. Wimmer and Ms. Christine E. Enemark, Covington & Burling, Counsel for Cook Inlet Region, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket No. 02-353, at 1 ("There is no showing that these partnerships [between designated entities and larger telecommunications providers] have disserved the public interest.").

fact that incumbent wireless carriers backed designated entity applicants is not, in itself, a sign that the program is flawed. Both Council Tree and the Commission fail to recognize that a host of small companies have had an opportunity to participate in the provision of wireless telecommunications services not only because of the designated entity program but because of the financial and other support of wireless carriers, including the five largest. In its rush to judgment, the Commission risks implementing an arbitrary and discriminatory restriction that will potentially undermine the program without solving any of the perceived abuses.

Cook Inlet takes personal exception to the implication from the Commission's *Further Notice* and Council Tree's proposal that past designated entity relationships with national wireless carriers are *per se* violations of the policies of the designated entity program. Nothing could be further from reality. Cook Inlet's participation in spectrum auctions in partnership with T-Mobile has been undertaken after careful review and analysis and advice from counsel, and has been fully consistent with the Commissions rules and the policies underlying those rules in all respects. Cook Inlet's agreements with its partner were carefully and diligently negotiated to preserve all necessary control rights for Cook Inlet, and Cook Inlet has maintained control over those partnerships consistent with these agreements and the requirements of the designated entity program. Cook Inlet has provided all further information requested by the Commission's staff to aid the Commission in evaluating its applications. Cook Inlet's applications have all been granted; Cook Inlet has never been disqualified as a designated entity because of its relationship with T-Mobile, and there would be no basis for any such finding. There is no basis in fact or law to justify declaring this relationship, or any other relationship like it, *per se* impermissible for the upcoming Auction No. 66 or any future auction.

III. COUNCIL TREE'S PROPOSAL, AS DESCRIBED IN THE *FURTHER NOTICE*, WOULD FAIL TO ACCOMPLISH EFFECTIVE REFORM OF THE DESIGNATED ENTITY PROGRAM.

Council Tree's proposal to restrict "material relationships" between designated entities and certain large wireless carriers is deficient in a number of respects. Defining what constitutes such a relationship in a manner that provides clear guidance to future designated entities without establishing arbitrary limits is difficult at best. Yet the Commission already has a standard – the "controlling interest" standard – based upon which it has evaluated these types of relationships for years with great success. The Commission's proposal in the *Further Notice* imposes an arbitrary restriction on the identity of designated entities' prospective partners, while the "controlling interest" standard is a flexible, fact-based approach that can accomplish the same goals of eliminating "sham" participants from future auctions. Arbitrary restrictions on designated entity relationships could unduly restrict the availability of capital to these small companies. If not carefully drafted, the restriction could discriminate against qualified designated entities by barring their participation in future auctions based on past relationships with large carriers, unintentionally penalizing those very applicants who fully complied with the Commission's rules in the past. And it is simply unreasonable to expect potential applicants in the upcoming Auction No. 66 to modify their business plans and commercial arrangements after the fact in order to comply with newly implemented rules. For these reasons, the Council Tree proposal to limit designated entities' future relationships with large wireless carriers should be reconsidered.

A. *The Commission Cannot Define What Constitutes a "Material Relationship" Without Undermining the Existing Regulatory Regime, Unnecessarily Restricting Available Investment Capital and Creating Uncertainty in the Marketplace – and the Rule Proposed in the* Further Notice *Is Arbitrary.*

There are several problems with Council Tree's proposal to restrict "material relationships" between designated entities and large incumbent wireless service providers. *First*, the Commission's rules already take into account the effect of certain relationships between a designated entity and its investors for purposes of awarding bidding credits or other designated entity benefits. Since 2000, the Commission has applied the "controlling interest" standard to determine the size and eligibility of potential participants in its designated entity program.[22] At that time, the Commission concluded that the "controlling interest" standard would be a "simpler and more flexible" method to evaluate whether a particular applicant qualified as a designated entity.[23] The Commission also concluded that application of this "controlling interest" standard would "ensure that only those entities truly meriting small business status qualify for our small business provisions."[24] Nothing on the record undermines this conclusion. In fact, the flexibility inherent in the control-based analysis derives from decades of case law development regarding the fact-specific consideration of *de jure* and *de facto* control. It is this very flexibility that best serves the designated entity program. Because the Commission does not impose a particular structure or set of structures on designated entity applicants, each applicant has the opportunity to establish its business arrangements in a manner best suited to achieve its particular business

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[22] *See Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures*, *Fifth Report and Order*, 15 FCC Rcd 15,293, 15,323 (2000) ("*Fifth Report and Order*").

[23] *Id.*

[24] *Id.* at 15,323-24. The Commission went on to conclude that "the *de jure* and *de facto* concepts of control, together with the application of our affiliation rules, will effectively prevent larger firms from illegitimately seeking status as small businesses." *Id.* at 15,324.

plan and capital needs so long as the arrangements satisfy the "controlling interest" standard. A regulatory regime should not dictate business decisions; to the greatest extent possible, regulators should leave commercial decisions to the free marketplace.

In order to evaluate every designated entity applicant pursuant to the "controlling interest" standard, the Commission requires that any designated entity applicant disclose a wide array of information, including the identity of any person or entity that holds a direct or indirect interest in the applicant.[25] In particular, each applicant must disclose or describe "all agreements and instruments . . . that support the applicant's eligibility as a small business under the applicable designated entity provisions, including the establishment of *de facto* or *de jure* control."[26] This disclosure requirement provides the Commission staff with ample opportunity to evaluate the structure of each proposed designated entity applicant to confirm that it complies with the Commission's rules. In all cases, the Commission grants licenses only after fully reviewing the relevant disclosures for compliance with the Commission's rules and standards regarding *de jure* and *de facto* control. The Commission has decades of experience in making the fact-intensive, case-by-case determination of whether a minority investor has an impermissible level of control over a designated entity and when it does not.[27] It is difficult to

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[25] *See* 47 C.F.R. § 1.2113.

[26] 47 C.F.R. § 1.2113(b)(2).

[27] *See, e.g., ClearComm, L.P.*, 16 FCC Rcd 18,627 (2001); *Airgate Wireless, L.L.C.*, 14 FCC Rcd 11,827 (1999); *Baker Creek Communications, L.P.*, 13 FCC Rcd 18,709 (1998); *Marc Sobel*, 12 FCC Rcd 3298 (1997); *DCR PCS, Inc.*, 11 FCC Rcd 16,849 (1996); *Ellis Thompson Corporation*, 9 FCC Rcd 7138 (1994); *Miller Communications, Inc.*, 3 FCC Rcd 6477 (1988); *Intermountain Microwave*, 24 Rad. Reg. (P&F) 983 (1963). The Commission has repeatedly stated that the question of *de facto* control must be evaluated based on all of the factual circumstances of a particular application. *See, e.g., Fifth Report and Order* at 15,324 ("De facto control is determined on a case-by-case basis . . . ."); *Baker Creek*, 13 FCC Rcd at 18,713, 18,715-16 (1998) (discussion of impact of investor protections as another factor to determine (continued...)

see how creating a new definition of "significant" or "material" relationships will lend clarity to this standard. How could it be the case that a contractual arrangement with a large carrier does not give the carrier an impermissible level of control over the applicant and yet that arrangement is *per se* impermissible? It is difficult to understand why the existing "controlling interest" standard is not a sufficient framework to evaluate the relationship between a designated entity and its investors, regardless of the identity of those investors. Nor is it clear how a rule that generically excludes participation by a certain class of carrier is an appropriate substitute for the Commission's existing practice to review carefully the facts of each application. This proposed, arbitrary restriction on the entities with which a designated entity may have a relationship does nothing to advance the Commission's case law and undermines the importance of a fact-based analysis that considers the totality of the circumstances.

Second, limiting certain carrier's support of designated entities will restrict unduly the ability of small companies to access the capital and technical expertise necessary to succeed in the wireless communications business. There is no question that a designated entity needs significant capital resources. As an initial matter, obviously, it must have available sufficient funds to pay for, in full, a Commission license won at auction.[28] Once an applicant receives a license, it must have sufficient capital resources available to purchase, lease, or otherwise gain

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control); *News International, PLC*, 97 FCC2d 349, 357-58 (1984) (discussing importance of certain negative covenants to determination of ultimate control).

[28] Since 1997, when the Commission suspending its installment payment program for designated entities, the Commission has required all applicants, including designated entities, to pay for their licenses in full rather than in installments. *See Fifth Report and Order* at 15,321-23 (*citing Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures; Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use; 4660-4685 MHz, Third Report and Order and Second Further Notice of Proposed Rulemaking*, 13 FCC Rcd 374, 397 (1997)).

access to the myriad of equipment necessary to construct and operate a wireless system with sufficient coverage to satisfy the Commission's construction requirements. The Commission has previously recognized the importance of giving small businesses broad access to capital markets.[29] The relationship with existing wireless carriers may be critically important for small companies, and any benefits from those relationships that may accrue to the existing wireless carrier are merely incidental for purposes of achieving the original objectives of the designated entity program – broad participation by small businesses. Restricting the availability of the five most likely investors will restrict capital and other resources necessary for designated entities to succeed, imposing unnecessary hardships on these potential participants without actually eliminating abuse by other non-controlling investors.

Third, the proposed prohibition on partnerships with large, incumbent wireless carriers is arbitrary. Why is it that the Commission is targeting only the nation's largest – those with more than $5 billion in average gross revenues – and not all wireless carriers? It is not clear how the incentives or practices of these carriers are any more detrimental to the program than the incentives of any investor in a designated entity, whether a large financial institution, venture capital fund, small wireless carrier or otherwise. Neither Council Tree nor the Commission provides any explanation or analysis as to why it is these carriers who are most likely to abuse the designated entity program, and this arbitrary objection to participation by these carriers is belied by the past decade of actual experience. It cannot be the case that simply because these

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[29] *See, e.g., Fifth Report and Order* at 15,325-26 (referencing the Commission's goal to provide "legitimate small businesses maximum flexibility in attracting passive financing"); *Section 257 Report* at 16,824-33; *Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Second Report and Order*, 9 FCC Rcd 2348, ¶ 271 (1994) ("*Second Report and Order*") (recognizing that small business benefits must go to those applicants small enough to require the benefits but with sufficient financial wherewithal to construct and operate systems).

carriers are bigger, or that these carriers support designated entities, they are inherently suspect. The suggestion that these carriers, and the small businesses who partner with them, are *per se* violators of the Commission's designated entity rules, without evidence to support that conclusion, is discriminatory.

The mere fact of large wireless carriers' widespread participation in Auction No. 58 as cited by Council Tree is not evidence of abuse of the program by these carriers. Council Tree attempts to demonstrate abuse by describing the total amount of spectrum acquired in Auction No. 58 by designated entities backed by the five largest wireless carriers. There is, however, no foundation for any claim that these large carriers are responsible for any violations or abuses, whether real or perceived, of the Commission's designated entity rules.[30] Furthermore, the *Further Notice* altogether ignores the most significant criticism levied by Council Tree against the designated entity program – namely, the ability of high net worth individuals to qualify as designated entities. The Commission's current rules exclude "personal net worth" from the revenue calculations made for purposes of determining designated entity eligibility.[31] Just as it is not clear why the Commission has targeted the incumbent wireless

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[30] The number and geographic coverage of licenses offered in Auction No. 58 were significantly more limited that the licenses offered in past auctions in which designated entities participated. *Compare Broadband PCS Spectrum Auction Scheduled for January 12, 2005*, Report No. AUC-04-58-C, DA 04-3005, at 3, 4 (Sept. 16, 2004) ("Auction No. 58 will offer 242 broadband PCS licenses" in 10 or 15 MHz blocks) *with Additional Information Regarding Broadband PCS Spectrum Included in the Auction Scheduled for March 23, 1999, Comment Sought on Auction Procedural Issues*, Report No. AUC-98-22-B, DA 98-2337, at Attachment (Nov. 19, 1998) (listing over 350 licenses for auction in 10, 15 and 30 MHz blocks). This may explain the more limited participation by total auction participants as well as designated entities in Auction No. 58 as compared to other auctions.

[31] *See* 47 C.F.R. § 1.2110(c)(2)(ii)(F); *Amendment of Part 1 of the Commission's Rules - Competitive Bidding Procedures, Second Order on Reconsideration of the Third Report and Order and Order on Reconsideration of the Fifth Report and Order*, 18 FCC Rcd 10,180, 10,185 (2003).

service providers, it is not clear why the Commission has ignored Council Tree's allegations of abuse by "wealthy individuals" who backed designated entity applicants in the past. If the harm to the designated entity program identified by Council Tree is the participation by wealthy individuals in these auctions, then the Commission's efforts to restrict participation by large, incumbent wireless carriers has no rational connection to, and will have no impact on, future participation by these wealthy individuals. The decision to focus on wireless carriers as opposed to more general aspects of the designated entity program has no rational foundation and is arbitrary.

Fourth, the rule change as proposed in the *Further Notice* is an inappropriate attempt by the Commission to control the marketplace. Council Tree has implied that the designated entity program is to blame for the fact that a significant portion of the nation's wireless subscribers are customers of five large companies. But the fact of consolidation is independent of the designated entity program. While small businesses may be significant innovative or competitive forces in the wireless industry, the extent of consolidation in any industry is determined largely by free market forces. If the Commission wishes to limit consolidation among wireless carriers and concentration of spectrum in the hands of a few incumbents, it should do so directly, by conditioning its approval of subsequent mergers or reintroducing the spectrum cap. It should not attempt to accomplish these goals indirectly through misguided attempts to reform the designated entity program. Indeed, the mere fact of consolidation in the wireless industry is not a valid criterion on which to evaluate the success or failure of the designated entity program and the integrity or the failures of the rules on which the program is based. The Commission should not attempt to reduce wireless market consolidation indirectly by establishing new rules in the context of the designated entity program.

B. ***Designated Entity Reform Should Not Create Retroactive Penalties.***

It is not clear from the *Further Notice* to what extent a new rule restricting "material relationships" would have a potentially retroactive effect on designated entities that previously participated in the Commission's auctions. Would a current designated entity be restricted from participating in the upcoming Auction No. 66 or future auctions simply because it or its affiliates has today, or has had in the past, a relationship with such an incumbent wireless service provider? More specifically, would Cook Inlet be precluded from participating in future auctions because its subsidiary is currently a party to certain "material" operational agreements with T-Mobile with respect to its Auction No. 58 licenses?[32] Would Council Tree and its other partners in Auction No. 35 – Sealaska Corporation, Doyon Ltd. and Arctic Slope Regional Corporation – be precluded from participating as designated entities because the applicant they supported in that auction had a "material" financial relationship with AT&T Wireless Services, Inc.?[33] It is simply not clear from the *Further Notice*. Any application of this proposed restriction in future auctions based on past relationships would unfairly prejudice many otherwise qualified designated entities. No designated entity should be prevented from participating fully in future auctions simply because it currently has or previously had a commercial arrangement with one of these targeted wireless carriers in full compliance with the Commission's rules.[34] At a minimum, any rule adopted by the Commission in this context must

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[32] *See* File No. 0002069569.

[33] *See* File No. 0000363827.

[34] This result is consistent with past instances in which the Commission has adopted rule changes in the designated entity context with respect to future auctions but declined to impose compliance with those rule changes on licensees holding licenses won in previous auctions. *See, e.g., Fifth Report and Order* at 15,326 ("We see no reason to require that existing C and F block licensees restructure to meet new standards in order to remain licensees.").

take account of past activities in compliance with the Commission's past rules, and must be drafted carefully to avoid any ambiguity or unfair retroactive penalty.

C. *Requiring Post Hoc Revisions to Designated Entity Applications for Auction No. 66 Is Problematic.*

The Commission has proposed applying any rule change arising out of this proceeding to the upcoming Auction No. 66 for which short form applications are due at the end of next month. It is ludicrous to believe that any designated entity will go to the trouble and expense of creating a business plan, establishing the necessary commercial relationships, and filing an application to participate in this auction without knowing, to some degree of certainty, the rules that will govern its participation. By following this approach, the Commission is effectively eliminating participation by small businesses, such as Cook Inlet, that historically have partnered with the very carriers the Commission is seeking to exclude from participating in this and future auctions. How can Cook Inlet possibly file a short form application declaring its intent to partner with T-Mobile, knowing that any "amendment" to comply with these proposed restrictions would require wholesale redesign of its business plan and a new business partner? The result of this uncertainty may well be limited participation by designated entities. The spectrum in this upcoming auction is a valuable resource, and the Commission is clearly facing pressure to realize significant revenues from the proceeds of the auction for the benefit of the federal treasury.[35] The Commission should have a care that its congressional mandate – to ensure the continued participation by small businesses in spectrum-based services – does not fall

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[35] *See, e.g.*, Pelofsky, J., "Bush Administration Sees $25 Bln in Wireless Sales," *Reuters*, Feb. 6, 2006 ("The sale of U.S. wireless communications licenses is projected to raise about $25 billion between 2007 and 2009, $7.8 billion higher than last year's estimate [for the same period] . . . .").

subservient to any administrative pressure to maximize revenues.[36] Raising revenue has never been the sole, or even the primary, justification for spectrum auctions.[37] The Commission risks jeopardizing its revenue targets as well as its public policy objectives by creating uncertainty so close to the filing deadline for short form applications to participate in Auction No. 66. The Commission must have final rules in place regarding the designated entity program before it can reasonably ask these applicants to declare their intention to participate.

IV. THE COMMISSION SHOULD CONSIDER ALTERNATIVE APPROACHES TO DESIGNATED ENTITY REFORM.

Because the *Further Notice* fails to identify clearly the problem to be resolved or the policy objective to be promoted, the Commission has set itself a difficult task. Absent an understanding of the desired result of these regulatory reforms, it is impossible to evaluate or predict the efficacy of the proposed rule or to make alternative suggestions as to the best way to achieve the desired result.

Cook Inlet has always supported the integrity of the designated entity program, and has no quarrel with the Commission to the extent it wishes to improve the efficacy of the program. A logical first step in any reform effort is first to identify with specificity the scope of the problems to be addressed. Nowhere does the *Further Notice* identify the problem the Commission hopes to solve, much less the scope and boundaries of the problem. By undertaking a more thorough review, both on its own initiative and through the help of third parties, of the

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[36] *See* 47 U.S.C. §§ 309(j)(7)(A) and (B) (the Commission may not base a finding of public interest, convenience and necessity solely or predominantly on the expectation of federal revenues).

[37] *See, e.g., Second Report and Order* at ¶ 73 ("While Congress has charged us to recover a portion of the value of the public spectrum made available via competitive bidding, this does not amount to maximizing revenue, nor is it our sole objective.").

designated entity program and its successes and failures over the years, the Commission can take a critical first step on the path to real, effective reform.

Without this identification of the problem, it is difficult to offer alternative suggestions to Council Tree's proposals. It seems, however, that the best starting point for effective reform is an examination of the principles of control and the application of those principles to the wireless telecommunications industry. Since its decision in *Intermountain Microwave*,[38] the Commission has relied on a six-factor test to determine whether and to what extent a passive investor in a licensee or other third party has prematurely obtained an improper level of control over that licensee.[39] The Commission went a step further in 2000 and codified those factors in the regulations that govern participation in spectrum auctions as designated entities.[40] This "controlling interest" standard has served the Commission well because the standard is both predictable for potential applicants and sufficiently flexible to take account of changing market conditions and developing commercial relationships. Rather than abandon this

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[38] 24 Rad. Reg. (P&F) 983 (1963).

[39] *See, e.g., Airgate Wireless, L.L.C.*, 14 FCC Rcd at 11,841-42 (applying six factor test to relationship between Leap and Qualcomm to determine whether Qualcomm exercised ultimate *de facto* control over Leap and its PCS licenses); *Baker Creek*, 13 FCC Rcd at 18,714 (1998) (applying six factor test to application for 232 local multipoint distribution service licenses); *Marc Sobel*, 12 FCC Rcd at 3299 (1997) (applying six factor test to questions of ownership and control of Part 90 land mobile stations operating in the 400 MHz and 800 MHz bands); *DCR PCS, Inc.*, 11 FCC Rcd at 16,861 (1996) (referencing six factor test); *Ellis Thompson Corporation*, 9 FCC Rcd at 7138-7139 (1994) (applying six factor test to cellular frequency block A); *Miller Communications, Inc.*, 3 FCC Rcd 6477 (1988) (applying six factor test to cellular licensee). The six factors used to evaluate *de facto* control are: (1) who has unfettered use of all facilities and equipment; (2) who controls daily operations; (3) who determines and carries out the policy decisions, including preparing and filing applications with the FCC; (4) who is in charge of employment, supervision and dismissal of key personnel; (5) who is in charge of the payment of financial obligations, including the expenses of operation; and (6) who receives revenues and profits from the operation of the facilities.

[40] *See* 47 C.F.R. §§ 1.2110(c)(2)(ii)(H) and (I); *Fifth Report and Order*.

standard in favor of other, discriminatory restrictions, the Commission should consider whether there are certain facts, relationships, agreements or other circumstances that raise particular concerns for the Commission in its evaluation of designated entity applicants. It should then consider increasing the number of factors evaluated to determine *de facto* control to take account of these additional facts, relationships, agreements or circumstances in a neutral way. With this approach, the Commission can adopt any changes that are necessary to preserve the integrity of the designated entity program in a manner that will be viable in the marketplace and consistent with the underlying policy objectives of the program.

For example, one possible factor in the context of evaluating the "controlling interest" standard might be whether a designated entity has contributed some minimum amount of equity to any venture that seeks to qualify for benefits such as bidding credits. The Commission considered such a rule in 2000 but rejected it, concluding that such a requirement would unnecessarily limit the ability of designated entities to fundraise.[41] Although no equity requirement currently exists, Cook Inlet has always contributed a significant amount of the total equity to each of its partnership applicants and without borrowing the necessary capital from its partner. For example, in Auction No. 58, Cook Inlet contributed $80 million of its own capital to the applicant, which constituted 34 percent of the total equity in the applicant. To the extent the Commission concluded that certain designated entities did constitute "shams," as Council Tree has suggested, then imposing a minimum equity requirement could increase the likelihood that only viable, interested small businesses participate in the designated entity program.

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[41] *See Fifth Report and Order* at 15,325-26.

Another alternative might be imposing a periodic reporting and review requirement on designated entities who receive spectrum licenses in auctions. For example, the Commission could require that each designated entity submit an annual report detailing the actions it took during the past period with respect to the licenses it holds as well as any actions taken by its limited financial partners. In this manner, the Commission would have some empirical evidence of the degree of day-to-day control actually exercised by the parties who purport to be in *de facto* control of these designated entity licenses. Again, to the extent the Commission seeks to prevent "sham" designated entities from participating in future auctions, holding these applicants to a reporting requirement and the possibility of a further audit might dissuade some abuse of the Commission's rules and ensure long-term operational compliance with the legal requirements of the "controlling interest" standard.

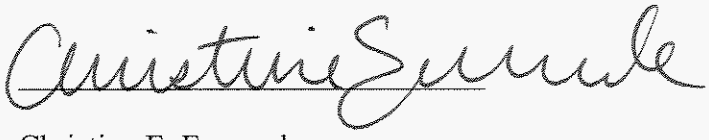
These two alternatives have the benefit of building on the existing standards enforced by the Commission against all designated entities without arbitrarily restricting the participation by certain companies. By enforcing stringently its existing standards, and supplementing those existing standards with additional factors, the Commission could make great progress in eliminating any abuses without jeopardizing participation by real, qualified designated entities.

V. Conclusion

The Commission is an expert agency, and its staff is uniquely qualified to evaluate compliance with its designated entity rules and eliminate "sham" structures or other violations. It should not be prematurely swayed by unfounded charges that the program has failed in some respect. It should take a reasoned approach to any necessary reform. And it should take care not to undermine the goals of the program for which the Commission has long and consistently striven, with great success.

Respectfully submitted,

COOK INLET REGION, INC.



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